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Association of Justices
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Committee on
Law and Procedure

Report on
**CRIMINAL REMEDIES IN MASSACHUSETTS
FOR FAILURE TO FURNISH SUPPORT**

Report No. 7

August, 1916

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Criminal Remedies in Massachusetts for Failure to Furnish Support.

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THE rapid growth in recent years of criminal remedies for failure to furnish support, developing at last into the Uniform Desertion Act, St. 1911, c. 456, amended by St. 1912, c. 264, c. 310, St. 1914, c. 520, the Illegitimate Children Act, St. 1913, c. 563, and the Destitute Parents Act, St. 1915, c. 163, has created a need for a practical monograph upon the subject. While uniformity of decision and procedure among the seventy lower courts of the Commonwealth, as well as in the Superior Court, is most desirable, differences in sentences and methods still exist, in cases brought under these acts. The committee trusts that this monograph may lead to uniformity in practice and greater effectiveness in the solution of the problems presented in cases of this character.

The adjustment of domestic relations is a large part of the social work of the courts. In all the problems growing out of these relations, the community, as well as the individuals immediately concerned, has a real and vital interest. Its right to be protected from the ignorance and the wilful remissness of men and women legally and morally responsible has been recognized by the legislatures of this state and most other states in the passage of legislation such as is discussed in this report.

These laws deal in the main with those violating family obligations in such a way that they commit an offence not only against the individual but against the public as well. It is not alone in these respects that the problem presents real difficulty; its importance is also emphasized in the social problems connected with children. A large proportion of juvenile delinquency can be traced directly to improper sustenance and lack of proper home life and parental control and training. While cases of illegitimate children do not involve the transgression of legal family obligations, the conditions as to support are similar, and call for the same treatment.

The Uniform Desertion Act is the prototype of both the Illegitimate Children Act and the Destitute Parents Act, which merely extend its principles and methods to other cases. They may be called collection statutes, but that is no reproach to them.

All intelligent criminal laws are intended primarily to compel the observance of the law and the fulfilment of legal obligations; punishment or the threat of punishment is only a means to that end. The advantage of the statutes under discussion over other criminal laws is that performance of the legal obligation is often accomplished directly through judicial supervision, and not merely indirectly through punishment or threat of punishment. In our judgment, the penalties provided by these statutes should rarely, if ever, be used except to compel obedience to orders for payment made by the court.

Much of the discussion of the Uniform Desertion Act will be found applicable to the Illegitimate Children Act and the Destitute Parents Act, since those acts adopt in terms the practice established by the earlier act. Our plan, therefore, will consist of a treatment of the Uniform Desertion Act, followed by some remarks upon the special features of the other acts.

THE UNIFORM DESERTION ACT.

Two quotations from courts of last resort aptly state the fundamental principles of the act. "The performance by a husband and father of the legal duties which he voluntarily assumed in contracting marriage is a matter which not only affects the particular parties in interest, but the public at large, as affecting the general public welfare. The state is deeply interested in upholding and seeing enforced the rights and obligations springing from the family relations, for upon their being upheld and enforced rest the well-being of society itself." *State v. Cucullu*, 110 La. 1087. "While one of the objects of the statute is doubtless to prevent wives and children from becoming a charge upon the public for their support, this is not its chief object. The higher and more important purpose of the Legislature in passing the law was to provide directly for neglected wives and children, and to punish the infliction of this kind of wrong upon them, and, by the fear of punishment, to deter husbands and fathers from leaving their families to endure privation." *Com. v. Acker*, 197 Mass. 91.

There has been much discussion and debate, of recent years, as to the exact social value of marriage and as to the moral duties involved in the relation. Many people consider that such moral duties are firmly and irrevocably established by religion. With such discussions this monograph has little to do. We are now concerned with the economic status of marriage, rather than the

moral or even the social. Whether, or how far, the state should permit abnormal marriage relations to be terminated, and the parties restored to their former freedom, is beyond the present discussion; sometimes the state does in fact terminate the social obligations of marriage, while retaining its economic obligations, as in the case of a divorce with alimony. But at least until the state has terminated the marriage, and even afterwards for the benefit of the children and sometimes the wife also, the community must insist upon the fulfilment of the economic obligations involved. Much has been said about the social value of the family as a unit in the state; but for our present purposes it is sufficient to note that the present constitution of society assumes, and requires the state to enforce for its own economic protection, the duty of the head of the household to provide for the material needs of his wife and dependent children.

Yet it must not be forgotten, in discussing the subject, that we are dealing with abnormal, and not normal, domestic relations. In normal cases there is no need of judicial interference. We must not commit the common error of expecting that legislative or judicial action or prohibition will often convert a house of discord into a home, or induce dissatisfied, estranged and embittered persons to live together in happiness or even to live together at all. Frankly recognizing, therefore, that we are dealing with matrimonial failures, and usually with proved and settled ones, the question arises for the legislature and the courts, What measures may justly and properly be taken, if not to coerce the parties into the similitude of normal marriage, at least to compel the performance of its economic obligations?

In this connection we must recognize from the outset, that on the economic side as well as the social, the words "marriage," "husband," "wife" and "home" may mean a hundred different things in a hundred different families. The common law apparently took as the norm a family consisting of husband, wife, and numerous children, for which the husband was the sole provider. But the complexity of modern society, the increased employment of women outside the home, the decreased birth rate among many classes of people, and other causes, have produced, especially in our cities and factory towns, a great many families in which the situation is very different from that contemplated by the framers of the common law. In many families both husband and wife earn, and in some the wife earns considerably more than the husband. While the courts have no authority to change the principles of the common

law, they must apply them with an intelligent appreciation of the complicated problems that modern life has created.

In many discussions of the subject that we have seen, insufficient consideration has been paid to the interests and feelings of the man against whom the proceedings are brought. Too often the question is approached with a mental picture of a normal home, and the moral iniquity of deserting such a home blinds the student to the real facts. The truth is, that many complainants obviously would be hard for anyone to cherish. Whether the fault is primarily that of the husband, or of the wife, or of both, the husband in almost every case has lost all affection for his wife. That in itself is a tragedy, to the man as well as to the woman. She signifies to him merely a legal obligation, and, unless he be a man of high principle, his moral obligation is hard for him to understand. A poor man, whose wife has given him neither love nor comfort, and yet has committed no act excusing him from support, is apt to consider the obligation of maintaining her out of his scanty earnings an unjust calamity, imposed upon him for life by an unfeeling power; and he comes into court aggrieved, embittered and rebellious. While the law must enforce the economic independence of families in order that the state shall not have to assume tremendous burdens not contemplated by any but a socialistic organization of society, yet we must not be unsympathetic in dealing with defendants nor cocksure that the action which the law compels us to take represents exact moral justice in every case.

History of the Act.

Although a civil remedy for non-support had been provided in the Probate Court as early as St. 1874, c. 205 (R. L. c. 153, § 33), the criminal remedy dates only from St. 1882, c. 270, § 4, relating to non-support of children, which by St. 1885, c. 176, was amended to include the non-support of wives. *Com. v. Burlington*, 136 Mass. 435.

The penalty provided by these statutes, as codified in R. L. c. 212, § 45, was a fine of not more than twenty dollars or imprisonment for not more than six months, with a provision that fines might be paid, in the discretion of the court, to the person or institution supporting the wife or child. Under that state of the law arose the practice, now obsolete, of imposing a fine of twenty dollars for the benefit of the wife or child, and committing the defendant until the fine should be paid.

The first statute to provide for modern practice in these cases was St. 1905, c. 307, under which probation and periodical pay-

ments to the probation officer, as a substitute for sentence, first made their appearance. The court was given power to require a bond with sureties in a sum not exceeding two hundred dollars, to secure the making of the periodical payments ordered. This act, after its accidental repeal by St. 1907, c. 563, § 26, was re-established by St. 1908, c. 104. In the meantime, by St. 1906, c. 501, the whole subject had been dealt with, and a similar practice provided, while the maximum fine had been raised to one hundred dollars. St. 1909, c. 180, added some features now incorporated into the present law.

The Commissioners on Uniform State Laws became interested in the subject, and reported a bill called the Uniform Desertion Act. This act, in substance, has been adopted by Kansas (Session Laws 1911, c. 163), North Dakota (Laws 1911, c. 123), Wisconsin (Session Laws 1911, c. 576, amending § 4587 c), Vermont (Acts 1915, No. 101), Delaware (Laws 1913, vol. 27, c. 262), Texas (Gen. Laws 1913, c. 101, omitting provision for orders for support), and Massachusetts. The state of Louisiana already had a somewhat similar act, from which the Uniform Desertion Act was apparently borrowed. 1 Marr's Ann. Rev. Stat. La. § 1658, Acts 1902, c. 34.

The Uniform Desertion Act was adopted by the Conference of Commissioners on Uniform State Laws on August 26, 1910, and is printed in Volume 35, Reports of the American Bar Association, page 1179. Some of the states have adopted it verbatim, and others with considerable variation, and the uniformity which was desired is somewhat lacking. Delaware and Wisconsin include illegitimate children in the act. The variation of the Massachusetts act from the original is the greatest of all; not only have matters of local practice been incorporated into the statute, as the commissioners intended, but the substantive provisions have been enlarged and altered. St. 1911, c. 456. St. 1912, c. 264, c. 310. St. 1914, c. 520.

AN ACT TO MAKE UNIFORM THE LAW RELATING TO DESERTION AND
NON-SUPPORT OF WIFE BY HUSBAND OR OF CHILDREN BY EITHER
FATHER OR MOTHER.

Be it enacted, etc., as follows:

Section 1. Any husband who without just cause deserts his wife or minor child or children, whether by going into another town or city in this commonwealth or into another state, and leaves them or any or either of them without making reasonable provision for their support,

and any husband who unreasonably neglects or refuses to provide for the support and maintenance of his wife or minor child or children, or abandons or leaves them or any or either of them in danger of becoming a burden upon the public, and any parent, whether father or mother, who deserts or wilfully neglects or refuses to provide for the support and maintenance of his or her child or children under the age of sixteen, or whose minor child by reason of the neglect, cruelty, drunkenness, habits of crime or other vice of such parent is growing up without education, or without salutary control, or without proper physical care or in circumstances exposing such child to lead an idle and dissolute life, shall be guilty of a crime, and on conviction thereof shall be punished by a fine not exceeding two hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

“Any husband who without just cause deserts his wife or minor child or children whether by going into another town or city in this commonwealth or into another state, and leaves them or any or either of them without making reasonable provision for their support.”

Note that three elements must co-exist: (1) Desertion by leaving the town, (2) want of just cause, and (3) want of provision for support.

This part of the statute is evidently aimed at the offence of running away from the obligation to support. So long as the defendant remains within the town, where he can readily be found, or indeed within the commonwealth, the non-support provision of the statute furnishes an ample remedy, and complaints for desertion, even when possible, are unusual. The principal utility of a desertion complaint is in the case of a man who leaves the commonwealth, without having previously been guilty of non-support. Since the offence of non-support probably cannot be committed in a state in which the defendant has ceased to reside (*Com. v. Acker*, 197 Mass. 91, and cases cited post, page 20), the only offence for which this commonwealth may punish him is that of desertion, which takes place where the wife or children are left. *Jemmerson v. Georgia*, 80 Ga. 111. *People v. Crouse*, 86 App. Div. (N. Y.) 352.

It has been held that desertion is a single act, not a continuous offence, and that a man cannot be punished for it more than once, unless he returns to his wife and again deserts her. *Jemmerson v. Georgia*, 80 Ga. 111. *Gay v. State*, 105 Ga. 599. *State v. Hoon*,

78 Neb. 618. *People v. Albright*, 161 Mich. 400. *State v. Langdon*, 159 Ind. 377. *State v. Deaton*, 65 N. C. 496.

The statute wisely does not attempt to require a man to live with his wife or child against his will, any more than the law requires a woman to live with her husband. *Tasker v. Stanley*, 153 Mass. 148. Desertion, where the husband makes suitable provision for the wife and children, is no criminal offence. *State v. McPherson*, 72 Wash. 371. *Dempsey v. State*, 108 Ark. 76. *State v. Lasley*, 167 Mo. App. 464. *Cuthbertson v. State*, 72 Neb. 727. *Brown v. State*, 122 Ga. 568. In *People v. Stickle*, 156 Mich. 557, it was held that desertion is criminal, although the accompanying non-support is due to inability. Desertion, followed later by non-support, completes the offence, although for a time the wife or child is supported. *State v. Gilmore*, 88 Kan. 835. *Brown v. State*, 122 Ga. 568. *People v. Wexler*, 152 App. Div. (N. Y.) 67. A subsequent failure to support, after a separation by agreement, has been held to constitute an abandonment (*Spencer v. State*, 132 Wis. 509); but the better rule seems to be that a separation by consent cannot ripen into a desertion or abandonment by mere failure to support, without an attempt by the wife at reconciliation. *People v. Stickle*, 156 Mich. 557. *Virtue v. People*, 122 Ill. App. 223. *Ford v. Ford*, 143 Mass. 577.

The Commissioners' draft of the Uniform Desertion Act required, in several instances, that the wife or children be "in destitute or necessitous circumstances," in order to create a criminal offence, just as our divorce law makes divorce cases depend upon the accident whether the failure of the husband to furnish support results in actual suffering or not. *Peabody v. Peabody*, 104 Mass. 195. The act was adopted in Massachusetts without that phrase. Even with that phrase in the statute, it has been held in some enlightened decisions that actual physical suffering is not required, that the situation and estate of the husband may be considered, and that the charity of relatives and friends will not give immunity to the husband. *State v. Waller*, 90 Kan. 829. *State v. Weyant*, 149 Iowa 457. *Brandel v. State*, 161 Wis. 532.

"Just cause" for desertion must be the same as "just cause" for non-support, and can be discussed more conveniently in connection with the more common offence of non-support.

The Uniform Desertion Act has no application to illegitimate children (*People v. Fitzgerald*, 152 N. Y. Supp. 641) or step-children. *Mulhern v. McDavitt*, 16 Gray 404. *Brookfield v. Warren*, 128 Mass. 287. *Livingston v. Hammond*, 162 Mass. 375. *Coakley's*

Case, 216 Mass. 71. A husband may be guilty under the act although he is a minor. *Com. v. Graham*, 157 Mass. 73. A husband has been held amenable to the act although the marriage is voidable, where no competent court has declared it annulled. *State v. McPherson*, 72 Wash. 371. An adjudication in divorce proceedings, or in proceedings to establish the nullity or validity of marriage, and perhaps an adjudication in separate support proceedings in the probate court, fixes the matrimonial status of the parties, and the questions involved cannot be re-tried in criminal proceedings under this act. *Com. v. Shaman*, 223 Mass. 62. *Com. v. Ham*, 156 Mass. 485.

“Any parent, whether father or mother, who deserts . . . his or her child or children under the age of sixteen.”

The element of failure to support is not expressly required by this clause (*State v. Stout*, 139 Iowa 557. Cf. *Brown v. State*, 122 Ga. 568), although as reported by the commissioners the draft required the children to be in destitute or necessitous circumstances. See *People v. Lewis*, 132 App. Div. (N. Y.) 256. *Dalton v. State*, 118 Ga. 196. *Brown v. State*, 122 Ga. 568. It seems inconceivable that this provision was intended to punish a father who is willing to support his wife and his young children living with her. As to children, the word “desert” seems to involve and require an absence of care for their maintenance.

“Any husband who . . . abandons or leaves them [his wife or minor child or children] or any or either of them in danger of becoming a burden upon the public.”

This provision does not require that the defendant leave the state or the town, or that the children be under the age of sixteen, and in those respects it is broader than the two desertion clauses already discussed. But it is narrower in that it requires that the dependents be in actual danger of becoming a public burden.

Under statutes in other states where the whole purpose of the act has been held to be to protect the public against pauperism, it has been held that the danger of pauperism need not be imminent if it be probable. *Carney v. State*, 84 Ala. 7. *People v. Malsch*, 119 Mich. 112. But under such statutes a husband cannot be convicted, notwithstanding his breach of duty, if the efforts of his wife or her friends will probably prevent her from becoming a pauper. *People v. DeWolf*, 133 App. Div. (N. Y.) 879. *People v. Smith*, 139 App. Div. (N. Y.) 361. *People v. Crouse*, 86 App. Div. (N. Y.) 352. *People v. Miller*, 63 N. Y. Supp. 949.

“Any husband who unreasonably neglects or refuses to provide for the support and maintenance of his wife or minor child or children.”

“Any parent, whether father or mother, who . . . wilfully neglects or refuses to provide for the support and maintenance of his or her child or children under the age of sixteen.”

This statute creates a duty on the part of the mother, unknown to the common law, to support children under sixteen. *Tornroos v. R. H. White Co.*, 220 Mass. 336, 343. Compare *Gleason v. Boston*, 144 Mass. 25. *Somerset v. Dighton*, 12 Mass. 383. R. L. c. 81, § 10. R. L. c. 145, § 28.

The Wife's Obligation to Help Support Herself.

Whether the property or income or earning capacity of a wife should be considered upon the amount of support that reasonably should be furnished to her by the husband, is an important question. In *Prescott v. Webster*, 175 Mass. 316, the court said that the husband was not liable if the wife had property adequate for her support. See also *State v. Rice*, 106 Ind. 139. Earlier cases merely express a doubt whether a husband can ever be excused because of his wife's means (*Dolan v. Brooks*, 168 Mass. 350), except certain cases in Missouri which go to an absurd length in favor of the husband where the wife has some trifling property. *State v. Fuchs*, 17 Mo. App. 458. *State v. Maher*, 77 Mo. App. 401. *State v. Lasley*, 167 Mo. App. 464. Cf. *State v. Weyant*, 149 Iowa 457. In *Prescott v. Webster*, *supra*, no rule is laid down to guide the tribunal of fact upon the question whether the wife is expected to apply the principal of her property to her support, before calling upon her husband, but the matter was left generally to the jury, upon a consideration of the relative situations of the parties. As to children, a father, as well as a mother, has a right to have their property applied to their support, where the children are rich and the parent is poor; and the rule is even more favorable to the mother. *McGeary v. McGeary*, 181 Mass. 539. See also *Tornroos v. R. H. White Co.*, 220 Mass. 336.

In principle, the earning capacity of a wife ought to be considered as much as her property. It never was the common law idea that a wife was entitled to be supported in idleness — in the days when the common law was formed, even well-to-do women employed all their time in domestic arts. It is only in later years that changing modes of life have left many women with no con-

siderable employment within the home, and no need of being employed out of it, and that this situation has been looked upon as normal and as a right. Where the husband and wife live apart, and there are no children who need the time of the wife, there should be no absolute rule that a poor husband must support his wife in idleness.

Excuses for Non-Support.

It has been intimated here (*Com. v. Ham*, 156 Mass. 485) and decided elsewhere, that no reason is sufficient to excuse the failure to support a wife, that would not, in time at least, found an action for divorce. *State v. Stout*, 139 Iowa 557. *State v. Hill*, 161 Iowa 279. Inability to furnish support seems to be the only good cause that does not fall within the foregoing rule. *Dempsey v. State*, 108 Ark. 76. But the absolute identity of causes for divorce and excuses for failure to support may well be questioned, in view of the great variation in causes of divorce in various states and the different considerations involved in divorce cases.

Adultery on the part of the wife is good ground for a refusal to support her, and the only debatable question arises when the husband is equally guilty. *Hunter v. Boucher*, 3 Pick. 289. *State v. Schweitzer*, 57 Conn. 532. *Hawkins v. Hawkins*, 193 N. Y. 409. *People v. Bliskey*, 47 N. Y. Supp. 974. Cf. *Hall v. State*, 100 Ala. 86. Where a wife deserts her husband, i. e., leaves him without his consent and without any sufficient misconduct on his part — or, in the language of the separate support statute, without “justifiable cause” — she cannot pledge his credit for her support, and doubtless cannot prosecute a separate support petition or a complaint under the Uniform Desertion Act. But where the husband consents to the separation, or has been guilty of such misconduct as to justify his wife in leaving him, he is liable for her necessary support, and any neglect on his part is “unreasonable.” *Hancock v. Merrick*, 10 Cush. 41. *Mayhew v. Thayer*, 8 Gray 172. *Burlen v. Shannon*, 14 Gray 433. *Benjamin v. Dockham*, 132 Mass. 181. *Sturbridge v. Franklin*, 160 Mass. 149. *Newman’s case*, 222 Mass. 563. Probably misconduct insufficient to found a divorce may justify a wife in leaving her husband. *Watts v. Watts*, 160 Mass. 464. *Sturbridge v. Franklin*, 160 Mass. 149. *De Ferrari v. De Ferrari*, 220 Mass. 38. *Newman’s case*, 222 Mass. 563. In connection with the question of desertion, the right of the husband to determine the place of domicile should be kept in mind. *Franklin v. Franklin*, 190 Mass. 349. As to the right of a husband to refuse

to support his wife after discovering that at the time of marriage she was pregnant by another, see *State v. Widner*, 184 S. W. 909 (Mo. App.), and *Reynolds v. Reynolds*, 3 Allen, 605.

In *Alley v. Winn*, 134 Mass. 77, a husband escaped liability for the support of his wife by showing that his consent to the separation was conditioned upon her supporting herself, and lasted only so long as she should support herself. While an injunction may issue to restrain separate support proceedings brought in violation of the terms of a separation agreement lawfully and fairly made with a trustee (*Bailey v. Dillon*, 186 Mass. 244. Cf. *Silverman v. Silverman*, 140 Mass. 560, a case of a void agreement made directly between husband and wife), just as such an agreement may be enforced against a husband who refuses to pay as agreed (*Terkelson v. Peterson*, 216 Mass. 531) it has been held in Rhode Island that such an agreement cannot prevent a criminal prosecution for non-support, because the agreement does not bind the state. *State v. Karagavoorian*, 32 R. I. 477. Cf. *Virtue v. People*, 122 Ill. App. 223. *Com. v. Smith*, 200 Pa. St. 363. See also *Com. v. Shaman*, 223 Mass. 62. *Com. v. Ham*, 156 Mass. 485.

The Duty to Support Children.

The obligation of a father to support his children ought to be more stringent in some respects than that of a husband to support his wife. The children are not *sui juris*, and the agreement or misconduct of the mother, it is submitted, ought not to deprive them of their right to support.

The agreement of the mother or of a stranger to support the children, without any assistance from the father, ought not to have any effect upon his obligation in case they are in need. *Bowen v. State*, 56 O. St. 535. Nor, it seems, should the desertion or other misconduct of the mother have any such effect. *Bennefield v. State*, 80 Ga. 107. *Moore v. State*, 1 Ga. App. 502. *People v. Lewis*, 132 App. Div. (N. Y.) 256. It has also been held in Rhode Island and elsewhere that the refusal of the mother to surrender the custody of the children to the father does not excuse the father from his duty of support, regardless of the cause of the separation; the mother being equally entitled to the custody (R. L. c. 152, § 28. *Oliver v. Oliver*, 151 Mass. 349. *Stone v. Duffy*, 219 Mass. 178. *Haskell v. Haskell*, 152 Mass. 16. *Tornroos v. R. H. White Co.*, 220 Mass. 336) and the father having an ample remedy (R. L. c. 153, §§ 33, 37; c. 162, §4) if he can show that the interests of

the children require him to control them rather than the wife. *State v. Sutcliffe*, 18 R. I. 53. *Bowen v. State*, 56 O. St. 235.

Practical experience in administering the Uniform Desertion Act tends to show the wisdom of this rule. Wives cannot be restrained from leaving their husbands for causes other than the crude varieties of matrimonial infelicity that are legally causes for divorce or even for justified separation. Even where the wife is living apart for justifiable cause — i. e., consent or misconduct — it does not follow that the husband may not show that the children would be tolerably safe with him, as was suggested in *Hancock v. Merrick*, 10 Cush. 41, and *Reynolds v. Sweetser*, 15 Gray 78. Yet in all these cases the mother of the children, especially if they are young children, is almost invariably the proper custodian of them. *Oliver v. Oliver*, 151 Mass. 349. Usually the father recognizes that fact, until he is asked to pay for their support, and makes no effort to obtain the custody. As soon as he is brought into court on a complaint for non-support of the children, a great desire for the custody of the children awakens in his breast, and he becomes convinced that the mother is no proper custodian of them. His defence develops into a general attack upon his wife's want of cause for leaving him or for detaining the children from him, and upon her moral character in general. If such defences are encouraged, a technical but unreal demand for the custody of the children will become the regular move following every separation, and courts will have to try at great length a kind of controversy that experience has shown to be almost invariably illusory and purely tactical. Fathers who really desire the custody of their children, and can fairly claim it, adopt other remedies.

The Duty of Support as Dependent upon the Right to Custody.

The only difficulties in the way of adopting the Rhode Island rule just discussed, are the expressions of the court in certain Massachusetts cases where fathers have been sued by persons furnishing support to children in the actual custody of their mothers. In those cases it was held that a father's duty is conditioned upon his custody of the child, unless he has forfeited his rights by his cruelty; and that a father who is willing to support the child in his own house cannot be charged for its support elsewhere, although he has made no effort to secure the custody. *Hancock v. Merrick*, 10 Cush. 41. *Reynolds v. Sweetser*, 15 Gray 78. *Ben-*

jamin v. Dockham, 132 Mass. 181. *Baldwin v. Foster*, 138 Mass. 449. *Foss v. Hartwell*, 168 Mass. 66. *Glynn v. Glynn*, 94 Me. 465. But even if these cases are applicable to prosecutions under the Uniform Desertion Act, a court would not go wrong in the ordinary case in finding as a fact that the alleged willingness of the father to support the children is a mere technical fiction. See *People v. Dershem*, 78 App. Div. (N. Y.) 626.

Custody Legally Awarded to the Mother.

Somewhat allied to the preceding topic, is the question whether a complaint can be maintained for non-support of children, where their custody has been awarded to the mother or some other person in a divorce decree or by a decree of the probate court.

The common law theory that the liability of a father to support his child rests "upon the ground that he is entitled to the custody, the society, and the services of the child" (*Foss v. Hartwell*, 168 Mass. 66), has produced the strange result that if the father has been guilty of such misconduct that the custody of the child has been awarded to the mother or some other person, the father is no longer liable to a person furnishing support to the child. The husband exchanges custody for immunity. *Ryder v. Perkins*, 219 Mass. 525. In *Brow v. Brightman*, 136 Mass. 187, cited with approval in *Stone v. Duffy*, 219 Mass. 178, this result is placed on the ground that the father has no longer any right to take and support the child or to employ another to support it. In *Hall v. Green*, 87 Me. 122, the inconvenience of permitting an action of contract against a father who might also be required to pay for support under the decree by which custody was awarded, imposing upon him a double liability, was relied on to justify the same result; and similar considerations were relied on in *Malden Hospital v. Murdock*, 218 Mass. 73, to relieve from contract liability a husband who was subject to an order for payment to his wife in separate support proceedings. On the other hand, it was forcibly denied in *Spencer v. Spencer*, 97 Minn. 56, s. c. 2 L. R. A. (N. S.) 851, and note, that taking the custody of children away from their father for his fault had any effect upon his obligation to support them.

Whatever be the true ground of the Massachusetts rule, it seems equally applicable to proceedings under the Uniform Desertion Act to enforce the common law obligation of the father to support his children, and to actions of contract against

him. Under the Massachusetts rule, the taking of custody from the father appears to terminate the common law obligation, and the only obligation remaining upon him is that which may arise from the decree of the court awarding the custody. *Ryder v. Perkins*, 219 Mass. 525. That obligation the criminal courts are not authorized to enforce. In order to preserve the criminal remedy, the wife, in divorce or separate support proceedings, will often do well to avoid taking a decree for custody. *Gilley v. Gilley*, 79 Me. 292. *Glynn v. Glynn*, 94 Me. 465.

Children in Custody of the State.

Somewhat similar considerations apply where the custody of the child has been taken away from the father by an adjudication that the child is neglected, or by a commitment of the child as delinquent or as a juvenile offender. Where the child has been committed to the custody of the state board of charity the plain implication of the statute is that the obligation of the parent continues. St. 1911, c. 456, §§ 2, 5, 6, 8. See also *Purinton v. Jamrock*, 195 Mass. 187. In other cases of commitment, while any exemption of the parent from the obligation of supporting the child while in custody can hardly be supported on moral grounds, it is a serious question whether the theory that the obligation to support depends upon the right to services may not operate to furnish exemption. How sound that whole theory is, in public policy if not in law, may yet merit discussion; in illegitimate children cases the fact of paternity, rather than any balancing of support against services, is made to establish the obligation.

“Any parent, whether father or mother, . . . whose minor child by reason of the neglect, cruelty, drunkenness, habits of crime or other vice of such parent is growing up without education, or without salutary control, or without proper physical care or in circumstances exposing such child to lead an idle and dissolute life.”

This part of our statute is not included in the act as reported by the Commissioners, but was imported by our legislature from St. 1909, c. 180.

Other statutes provide for judicial proceedings for the care of any child who “by reason of orphanage or of the neglect, crime, cruelty, insanity or drunkenness, or other vice of its parents, is

growing up without education or without salutary control, or without proper physical care, or in circumstances exposing him to lead an idle and dissolute life, or is dependent upon public charity." St. 1909, c. 181. St. 1903, c. 334. St. 1906, c. 489 § 4. St. 1911, c. 175. St. 1912, c. 165. St. 1914, c. 272. *Farnham v. Pierce*, 141 Mass. 203. *Kelley, petr.*, 152 Mass. 432. *Wares, petr.*, 161 Mass. 70. *Purinton v. Jamrock*, 195 Mass. 187. *Com. v. Dee*, 222 Mass. 184.

Another statute punishes parents who are responsible for the delinquency of their children. St. 1916, c. 243, § 4. Report of Commission on Probation, Senate Document 330 of 1916.

Is the Jurisdiction Concurrent with that of the Probate Court ?

R. L. c. 153, § 33, provides a remedy in the probate court in case "a husband fails, without just cause, to provide suitable support for his wife, or deserts her, or if the wife, for justifiable cause, is actually living apart from her husband." *Doole v. Doole*, 144 Mass. 278. *Smith v. Smith*, 184 Mass. 394. *Shepherd v. Shepherd*, 196 Mass. 179. *Bucknam v. Bucknam*, 176 Mass. 229. *Kavanaugh v. Kavanaugh*, 146 Mass. 40. *McIlroy v. McIlroy*, 208 Mass. 458. *Penno v. Penno*, 195 Mass. 436. The last clause allows proceedings although the husband is furnishing ample support; but the first clause can hardly be distinguished from the words of the Uniform Desertion Act—"unreasonably neglects . . . to provide for the support and maintenance." In some closely contested cases, where misconduct of the wife is alleged, or where the adequacy of the support furnished is a close question, there is a natural tendency to regard the matter as one more fitting for determination in civil proceedings than in criminal, and to remit the wife to her remedy in the Probate Court; and a majority of this committee think the criminal courts have discretionary authority to do this, even by refusing to entertain complaints in such cases.

Possible Conflicts of Jurisdiction.

The question sometimes arises, whether the criminal court should take jurisdiction where the husband and wife are already in the probate court upon separate support proceedings, or in the divorce court where alimony might be awarded, *pendente lite* or by a final decree. In such cases the greater speed of the criminal remedy, and the supervision afforded by the probation system,

sometimes induce a complaint under the Uniform Desertion Act, notwithstanding the pendency of proceedings in another court.

There can be no legal objection to the jurisdiction of the criminal court, as the parties in the different courts are technically not the same. *Com. v. Simmons*, 165 Mass. 356. *Com. v. Ham*, 156 Mass. 485. Yet in this class of cases, as in the case where a new complaint, covering a later time, is instituted pending an appeal to the superior court from an earlier sentence, the jurisdiction should be exercised with caution. It is unwise to have different orders, from different courts, providing for support of the same person or persons, in force at the same time. Since the superior court and the probate court have broader powers, and their orders are, theoretically at least, more effective, the lower courts ought not to risk any conflict of jurisdiction in a case where any conflicting action is likely in either of those courts. This practice will conform to the spirit, though it is not required by the letter, of *De Ferrari v. De Ferrari*, 220 Mass. 38. Ordinarily no action should be taken until the proceedings in the other courts have been terminated.

Section 2. All fines imposed under the provisions of the foregoing section may, in the discretion of the court, be ordered to be paid in whole or in part to the probation officer under the provisions of section one of chapter two hundred and twenty of the Revised Laws, as amended by section one of chapter three hundred and thirty-eight of the acts of the year nineteen hundred and five, to be paid by such probation officer to the wife or to the city, town, corporation, society or person actually supporting the wife or minor child or children at the time when the sentence was imposed, or to the treasurer of the commonwealth for the use of the state board of charity if the minor child or children have been committed to said board.

This section was not in the draft as reported by the Commissioners. Under previous laws, it had been a common practice to impose fines for the benefit of the wife or child, to be paid to the wife or child or the person or organization supporting the wife or child. St. 1905, c. 307, § 1. St. 1906, c. 501, §§ 2, 4. The Uniform Desertion Act seems to limit the power to order such disposition of fines, to cases where the execution of the sentence of fine is suspended, and the older practice can no longer be lawfully adopted in cases of ordinary fines not suspended. This is of no great practical importance, because that older practice of dealing with these cases by fines is inferior to the modern practice of using orders for payment under § 5, and is practically obsolete.

Section 3. Proceedings under this act may be begun upon complaint made under oath or affirmation by the wife, or by the child or children, or by any other person against any person guilty of any of the above named offences, in the municipal, district or police court, or before the trial justice of the district in which the husband and wife, or either of them, are living or in which they last lived together.

This section, which was copied from St. 1906, c. 501, raises several troublesome questions.

In the first place, it probably precludes indictment, and requires in all cases a complaint before some lower court or magistrate. *Com. v. Rawson*, 183 Mass. 491. *Com. v. Blinn*, 219 Mass. 386. Cf. R. L. c. 157, § 7, c. 160, § 24. In this it differs widely from the desertion laws of many states, which unwisely make the offence a felony, requiring indictment (*Jones v. Robbins*, 8 Gray 329), and importing into the proceedings all the common law technicalities that were made to depend upon the rather useless distinction between felonies and misdemeanors. If there must be a choice between complaint and indictment, the Massachusetts choice is not to be regretted. It makes no substantial trouble in interstate rendition cases, because it is well settled that rendition may be had for misdemeanors, upon complaint supported by affidavits. *Ex parte Reggel*, 114 U. S. 642. *In re Strauss*, 126 Fed. 327; s. c., 197 U. S. 324. *McNichols v. Pease*, 207 U. S. 100.

The draftsman evidently did not understand that a trial justice has no district, but has a roving commission throughout the county, except where the district of some district, police or municipal court excludes his jurisdiction. R. L. c. 161, §§ 6, 9, 10, 28. The word "district" as applied to a trial justice must be construed to include such parts of the county as are not within the districts of any courts.

The jurisdiction of district, police and municipal courts, which usually extends beyond their judicial districts into towns within no judicial district (R. L. c. 160, § 24), is strangely limited under this statute to cases where both husband and wife have lived, or one of them does live, within the judicial district. The result is, that where both parties live in Manchester, for example, within no judicial district, a complaint will not lie in the neighboring district courts in Gloucester or Salem, but a trial justice residing in some more remote place like Peabody or Methuen must be sought. If both parties live in Stockbridge, within no judicial district, no complaint at all can be brought, for there is no trial justice in Berkshire county. This Committee asked the Legislature

to correct these absurdities (1916 Senate Bill 46, §§ 4, 12) but without success.

Jurisdiction in the cases discussed in this report ought not to be given to trial justices; except in Nantucket, where there is no choice, and where an attempt has been made to engraft some of the powers of courts. St. 1915, c. 101. Since trial justices have no regular or continuous courts, and can keep cases before them alive only by continuances from day to day (*Com. v. Maloney*, 145 Mass. 205), and since they consequently have no probation system, it is obviously impossible for them to adopt modern methods in handling these cases. In the Illegitimate Children Act, and the Destitute Parents Act, this fact is recognized, and no trial justice has jurisdiction except, by necessity, in Nantucket.

Despite these defects our statute is wisely drawn, though anomalously (*Com. v. Parker*, 2 Pick. 550), in making the venue depend upon the residence of the parties. The question is still open whether a mere sojourn in a place as distinguished from domicil, is enough to enable the proceedings to be brought there. *Com. v. Acker*, 197 Mass. 91. If the defendant lives within the commonwealth, the statute applies to him, and he may be punished for his refusal to support his wife or child living in another state or country. *Com. v. Acker*, 197 Mass. 91. We have no need, therefore, as to defendants domiciled in Massachusetts, to inquire whether the place of committing the crime, which ordinarily establishes jurisdiction, is where the defendant lives or where the dependent lives.

That question has been discussed in other states, with varying results. The statutes of Delaware and Texas expressly provide that the offence shall be deemed to have been committed in the county where the dependent lives. But where the question is not between counties, but between states, the local statutes can hardly be conclusive, and the question of the power of one state to impose criminal responsibility upon a non-resident who has done no act within the state, is a vital one. That question may become important here, where proceedings are brought against a non-resident of the state.

It is settled that a person outside the jurisdiction who puts in motion a force that takes effect within it, is answerable criminally where the evil is done, although never present there. *Com. v. Macloon*, 101 Mass. 1. *In re Palliser*, 136 U. S. 257. *Hyde v. United States*, 225 U. S. 347. In a number of states this analogy has been extended to cover the case of a man in one state or county

who by mere inaction neglects to support his family in another. Where the parties are in different states the principle must be the same as that involved where they are in different counties, except that in the latter case no constitutional question or question of state power is involved.

This extension of the principle to neglect cases is not so unreasonable where the dependent was sent into the jurisdiction by the act or consent of the defendant (*Bennefield v. State*, 80 Ga. 107. *Johnson v. People*, 66 Ill. App. 103. *People v. Quigley*, 134 N. Y. Supp. 953) or where the dependent remains in the same place where she was left by the defendant. *State v. Peabody*, 25 R. I. 544. *State v. Dvoracek*, 140 Iowa 266. *State v. Gillmore*, 88 Kan. 835 (distinguishable because defendant was in Kansas a few days during period covered by complaint). But where the dependent, without the aid or consent of the defendant, or perhaps without even his knowledge, removes into a jurisdiction where the defendant does not live, it is hard to understand the cases that hold that the defendant's inaction in another jurisdiction constitutes an offence against the laws of the place to which the dependent has removed. *In re Price*, 168 Mich. 527. *In re Poage*, 87 O. St. 72 (distinguishable on ground of voluntary presence of defendant within the state during period covered by indictment. Cf. *State v. Dangler*, 74 O. St. 49, a dependent parent case).

Some cases distinguish this last situation from the others, and seem to deny the jurisdiction. *Re Fowles*, 89 Kan. 430. One case, at least, denies the entire theory that the crime can be committed where the defendant is not present. *State v. Justus*, 85 Minn. 114. See also *Com. v. Acker*, 197 Mass. 91.

Uniform Blanks.

Most of the courts have adopted a uniform complaint, prepared by this Committee, blanks of which can be procured from Nathan Sawyer & Son, Inc., 41 Pearl Street, Boston, who keep the type set and are able, therefore, to furnish the blanks at low cost and at short notice. The same concern furnishes similar blanks under the other two statutes considered in this report. These blanks under the Uniform Desertion Act are drawn under the non-support clause of the statute, which is the one most commonly used, but the face of them can be altered so as to set out any other offence under the act, leaving the backing equally valuable.

Where the allegation in the blanks (see Heard, Mass. Crim. Law, 1st ed. 28) that the defendant is now living within the judicial

district of the court is untrue, the words "the wife of" may be inserted before the words "said defendant" in the allegation of residence, in order to show the jurisdiction; although the absolute necessity for the affirmative proof of jurisdiction by the record has been reduced by St. 1916, c. 174, § 2. If two counts, one for non-support of the wife and the other for non-support of the children, forming one complaint, are to be used, two blanks may be fastened together and slightly amended as to the caption and jurat to accomplish the result; but it has been held in Rhode Island that the non-support of both wife and children may be included in one count. *State v. Sutcliffe*, 18 R. I. 53.

Section 4. At any time before the trial, upon petition of the complainant and upon notice to the defendant, the court, or a judge thereof in vacation, may enter such temporary order as may seem just, providing for the support of the deserted wife or children, or both, pendente lite, and may punish any violation of such order as for contempt.

The speed of criminal proceedings in the lower court prevents any need of resort to this section. To delay the trial on the merits in order to make and enforce an unappealable order under this section, would seem to be an abuse of power. Usually the defendant consents to pay reasonable sums for the brief period of time elapsing before the case is heard. This section may well be used, however, in the Superior Court on appeal, and furnishes a sound remedy for the injustice caused by the suspension of payments pending an appeal, for which some petitioners for legislation, in ignorance of the technical machinery under this act, have proposed the unsound remedy of keeping in force, after an appeal, orders made in the lower court under § 5 of the act. It may be possible to use the same remedy in illegitimate children cases, provided the paternity and consequent liability have already been finally established. It seems clear that it may be used under the Destitute Parents Act.

Since St. 1916, c. 174, § 2, made the lower courts "courts of superior and general jurisdiction," it seems that their power to punish for contempt is no longer limited by R. L. c. 160, § 8, at least as to cases not included within the last named section; but that they have the general power inherent in courts of general jurisdiction. *Cartwright's case*, 114 Mass. 230. *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294. *Hurley v. Commonwealth*, 188 Mass. 443. R. L. c. 220, § 4. *O'Neil v. Commonwealth*, 165 Mass. 446.

Section 5. Before the trial, with the consent of the defendant, or at the trial, on entry of a plea of guilty, or after conviction, if the defendant is placed on probation or if his sentence is suspended and he is placed on probation under the provisions of section one of chapter two hundred and twenty of the Revised Laws, as amended by section one of chapter three hundred and thirty-eight of the acts of the year nineteen hundred and five, the court in its discretion, having regard to the circumstances and to the financial ability or earning capacity of the defendant, shall have power to make an order, which shall be subject to change by the court from time to time as circumstances may require, directing the defendant to pay a certain sum periodically, for a term not exceeding two years, to the probation officer, who shall pay over the same to the wife or to the guardian or custodian of the said minor child or children, or to the city, town, corporation or society supporting the wife or minor child or children at the time when the sentence was imposed, or to the treasurer of the commonwealth for the use of the state board of charity when the complaint is for neglect to provide for the support of the minor child or minor children who have been committed to the custody of said board; and the court shall also have power to release the defendant from custody on probation for the period so fixed, upon his or her entering into a recognizance, with or without surety, in such sum as the court or a judge thereof in vacation may order and approve. The condition of the recognizance shall be that if the defendant shall make his or her personal appearance in court, whenever ordered to do so, and shall comply with the terms of the order of support, or of any subsequent modification thereof, then the recognizance shall be void, but otherwise it shall be of full force and effect. Suit may be brought upon said recognizance by any person authorized by the court, and the proceeds of the suit shall be applied to the support of the wife or of the minor child or children as the court shall direct.

“Before the trial, with the consent of the defendant, . . . the court in its discretion . . . shall have power to make an order . . . directing the defendant to pay a certain sum periodically.”

This order is of no very binding effect, when made before trial, for no punishment can be imposed for its violation (*State v. Baker*, 112 La. 802) and the only remedy, in case of disobedience, is to “proceed with the trial of the defendant under the original charge” as provided by § 6. The same result is often accomplished by a simple continuance, with an understanding that the defendant shall pay to the complainant or the probation officer a certain

sum periodically. The only perceptible advantage in the order before trial, is the right to proceed at any time with the trial, upon "information and due proof under oath" of a violation of the order; and that result may be obtained by making a new complaint. An order for payment before trial is not a very practical measure, and is seldom or never used.

"At the trial, on entry of a plea of guilty, or after conviction, if the defendant is placed on probation or if his sentence is suspended and he is placed on probation under the provisions of section one of chapter two hundred and twenty of the Revised Laws, as amended by section one of chapter three hundred and thirty-eight of the acts of the year nineteen hundred and five."

"Conviction" means a finding of guilty, not the sentence, in this connection. *Munkley v. Hoyt*, 179 Mass. 108. While a plea of guilty or *nolo contendere* is doubtless a "conviction," the distinction taken in the statute between a plea of guilty, and a conviction, suggests that it may be inadvisable to act upon a plea of *nolo contendere* under this statute. Compare the Illegitimate Children Act, St. 1913, c. 563, § 7, using "conviction" only, doubtless in a broad sense, and § 6, using the words "after such adjudication," which, by reference to § 2, appear to be inclusive. The Destitute Parents Act, St. 1915, c. 163, follows the Uniform Desertion Act, and a plea of *nolo contendere* is therefore inadvisable.

The provision for orders to pay periodically may be used (1) where the defendant is placed on simple probation, and (2) where he is given a sentence, the execution of which is suspended under the statute, which is now St. 1913, c. 653, and R. L. c. 220, § 2.

In either case, the defendant is placed on probation. The statute requires that the terms and conditions of probation be furnished him in writing (R. L. c. 217, § 84. *Com. v. McGovern*, 183 Mass. 238), and proper terms and conditions are printed on the back of the uniform blank. The term of probation, by the better practice, runs to a day certain, and is not expressed as "six months" or "one year" or left wholly uncertain. Probation is really a supervised continuance *nisi*, in the true sense of that term (*Greenwood v. Bradford*, 128 Mass. 296), that is, a continuance to a day certain unless some occasion arises to deal with the matter sooner.

The period of the order for periodical payments is limited to two years, and consequently the period of probation should be

limited accordingly. In the opinion of the Committee, the period rarely should be less than six months, and usually should be as much as a year. At the end of the first period, it may be extended (R. L. c. 220, § 2, providing for continued suspension of sentence at any time before final disposition; St. 1913, c. 653, mentioning extensions of the period of probation; *Marks v. Wentworth*, 199 Mass. 44) so long as the whole period does not exceed two years; but short periods of probation are undesirable. There is no need of short probation periods, for the order for payment may be modified at any time, and the whole case may be dismissed if changed circumstances require it. If at the end of a probation period of nearly two years, the defendant is in arrears, the period for compliance with the order should not technically be extended beyond the two years; but there seems to be no reason why the probation may not be extended while the court awaits a belated compliance with the former order, and considers whether a sentence, or a revocation of the suspension of the execution of a sentence, is necessary.

We do not consider the imposition of a fine, and suspending the execution of it, because we think fines an obsolete remedy under this law. A suspended fine, intended as a coercive measure to induce compliance with an order of support, would be an anomaly, because the suspended sentence statute does not permit the imposition of a suspended fine upon any condition other than that the defendant pay the fine within the period of probation. A suspended fine, intended to be paid, is a mere temporary palliative of conditions that require a more permanent remedy.

The choice lies between ordinary probation, and what in Massachusetts we inexactly term a suspended sentence, but more properly is a sentence the execution of which is suspended. Where the defendant is well disposed, and needs only to have his duty declared by a court before performing it, ordinary probation will suffice. But in many cases ordinary probation means that the defendant, after a period of delay and struggle with the probation officer, will flout his authority and that of the court, and will join the mass of criminal appellants who flood the Superior Court. In most cases under the statutes considered in this report a suspended sentence should be imposed in the lower court, in order that the court granting leniency should have within its own control the power to make sure that its leniency, once sought and accepted, is not abused, to the destruction of every sound principle of probation. *Renado v. Lummus*, 205 Mass. 155. If no suspended sentence be

imposed at the outset, one should be given at the first sign of trouble while on probation. Care should be taken, however, to keep in mind, in imposing a suspended sentence, the possibility or probability that it will actually be served, and not to impose extravagant sentences merely *in terrorem*, resulting either in injustice or in the weakening of the system by a reduction or change of the sentence. Two or three months of imprisonment is suggested as the standard suspended sentence. Unless the defendant is an old offender, a short sentence gives opportunity for the hoped-for reformatory effect of the sentence, and the reinstatement of the defendant, after a period of punishment, in his normal place in the world; long sentences are of very doubtful value to the family. Suspended sentences exceeding six months ought never to be imposed in any class of cases, because of the difficulty of conforming to the anomalous requirements of St. 1911, c. 176, § 2, c. 461, which were evidently passed without any thought of suspended sentences, and which were discussed in the report of a special committee of this association, consisting of Justices Burke of Boston, Avery of Quincy and Lummus of Lynn, dated March 12, 1912, and in our Report No. 1.

The following table shows some of the results for the commonwealth in cases under the Uniform Desertion Act, and may be compared with the suggestions made in this report:

	1909	1910	1911	1912	1913	1914	1915
Number of cases pending and begun in Superior Court	220	251	280	416	530	710	808
Number of cases begun in lower courts	2,066	2,168	2,482	2,936	3,392	3,912	4,395
Committed for non-payment of fines	78	74	76	59	52	34	55
Sentences of imprisonment, for less than six months	175	188	223	245	355	461	486
Six months and less than one year	62	64	88	136	202	246	257
One year and more	0	2	1	17	24	25	17

"The court in its discretion, having regard to the circumstances and to the financial ability or earning capacity of the defendant, shall have power to make an order, which shall be subject to change by the court from time to time as circumstances may require, directing the defendant to pay a certain sum periodically, for a term not exceeding two years, to the probation officer."

As we have said, the use of such orders marks the modern method of dealing with cases under the statutes discussed in this report. In courts where conservatism or other reason has delayed the adoption of these methods, it is feared that the full value of these statutes has not been felt. While the amount of money collected by the probation officers in such cases is not an infallible criterion of the successful working of the system, the annual growth of the amount in many courts, some of which are listed in the following table, is worth notice:

NON-SUPPORT COLLECTIONS

(From probation commission reports. Courts collecting \$5,000 in 1915 shown separately)

	1909	1910	1911	1912	1913	1914	1915
Superior Court, all counties . . .	\$2,911	\$4,771	\$4,980	\$8,104	\$13,028	\$29,413	\$39,997
Municipal Court of the City of Boston,	1,430	4,325	5,278	12,064	23,003	36,500	34,621
Municipal Court of the Roxbury District	3,677	9,239	12,079	16,679	23,455	23,825	22,868
District Court of Southern Essex (Lynn) . . .	4,611	4,771	4,733	5,668	8,603	10,167	14,377
First District Court of Essex (Salem) .	800	1,998	2,559	7,380	14,085	12,228	12,556
Police Court of Springfield . . .	119	418	333	777	2,389	4,074	8,382
Third District Court of Eastern Middlesex (Cambridge) .	1,287	858	1,064	2,836	7,219	6,994	7,138
Police Court of Lowell	1,300	1,683	1,861	1,874	4,403	4,592	6,757
First District Court of Eastern Middlesex (Malden) . .	1,531	1,950	2,074	2,759	5,241	5,383	5,820
Third District Court of Bristol (New Bedford) . . .	0	0	41	576	1,238	2,086	5,483
Second District Court of Bristol (Fall River)	526	200	162	832	2,065	2,861	5,326
All other lower courts	7,096	10,115	9,998	22,867	36,044	51,707	58,204
Total for Commonwealth	25,288	40,328	45,162	82,416	140,773	189,830	221,129
*Received from masters of houses of correction . .	—	—	—	6,831	19,294	26,516	28,974

* From reports of controller of county accounts. 27

Some misapprehension has existed as to the effect of an order under this act. Some persons have supposed that a violation of the order is a contempt of court. In some courts, appeals have been allowed from such orders, and legislative proposals to make such orders continue in force after an appeal have been brought forward. Such notions result from an incorrect idea of these orders. Appeals can be taken from nothing but the judgment or sentence (*Marks v. Wentworth*, 199 Mass. 44. *Renado v. Lummus*, 205 Mass. 155), and a mere order like this is unappealable. *State v. Baker*, 112 La. 802. *State v. Mioton*, 112 La. 180. *State v. Gersdorf*, 124 La. 547. But the only means of enforcing it, where there is no suspended sentence, is by imposing a sentence "under the original conviction," as provided in § 6; and an appeal from that sentence terminates the power of the court. If the execution of a sentence is suspended, with an order for support, an appeal from the suspended sentence has the same effect. Even if a statute kept the order alive after an appeal, the lower court could not effectively enforce it; and it would be odd to require the Superior Court to enforce an order made in a lower court whose proceedings were vacated by appeal. Where there is a suspended sentence, however, with no appeal taken at the time of its imposition, the lower court has the means of enforcing its own order. *Renado v. Lummus*, 205 Mass. 155.

It is often desirable to continue the case for a short time, after conviction, to enable the probation officer to investigate the earnings of the defendant, and other circumstances, before making an order. In fact it is often desirable to have the matter investigated in that way at an earlier stage, before hearing or even before the defendant has been summoned to appear, and many couples can be spared, by that means, and by the efforts of the probation officer towards adjustment, the necessity of coming into court at all.

"Supporting the wife or minor child or children at the time when the sentence was imposed."

The draftsman apparently did not consider that in two classes of cases no sentence has been imposed at the time of order or of payment, namely: (1) where the order is made before trial, and (2) where the defendant is placed on ordinary probation, without suspended sentence. Even when the defendant is under a suspended sentence, sound policy requires the ultimate payee of the money to be the custodian of the child at the time of the payment, not the sentence. Perhaps the draftsman of the act misconceived

the order for support, thinking it a "sentence." The language employed may furnish an additional reason for the use of suspended sentences.

"The court shall also have power to release the defendant from custody on probation for the period so fixed, upon his or her entering into a recognizance, with or without surety, in such sum as the court or a judge thereof in vacation may order and approve. The condition of the recognizance shall be that if the defendant shall make his or her personal appearance in court, whenever ordered to do so, and shall comply with the terms of the order of support, or of any subsequent modification thereof, then the recognizance shall be void, but otherwise it shall be of full force and effect."

Under this act, it seems that the court has no right to place a defendant upon probation or under a suspended sentence without taking the recognizance specified. The act as drawn by the Commissioners did not require probation at all, but contemplated a release upon a recognizance to comply with the order. This recognizance is unlike the ordinary recognizance taken upon a continuance, or upon ordinary probation in other classes of cases (R. L. c. 217, § 63. *Com. v. McGovern*, 183 Mass. 238) in that the defendant is bound to "comply with the terms of the order of support," and a surrender of the principal does not discharge the surety from liability. *Miller v. Commonwealth*, 127 Pa. St. 122. Nor is the recognizance conditioned merely upon payment of the order, as was the one discussed in *Miller v. Commonwealth*, *supra*; another condition is that the defendant shall "make his or her personal appearance in court, whenever ordered to do so." This clause is a very inadequate substitute for the ordinary condition expressed in R. L. c. 217, § 63; but it probably binds the defendant to appear at the time fixed for the termination of the probation, and at any earlier time at which the court, through the probation officer, shall order the defendant to appear.

While the surety cannot exonerate himself fully, as he can in other cases (R. L. c. 217, §§ 66, 67), by surrendering the defendant, he probably is considered as bail for the appearance of the defendant, and may surrender the defendant under the statute cited, and thereby exonerate himself so far as the appearance of the defendant is concerned, though not as to compliance with the order for support.

There is no provision, such as exists in other classes of cases where recognizances are expected, on continuance or on appeal

(R. L. c. 217, §§ 34, 36, 41, 48, 57) for commitment to jail for failure to recognize, or until the defendant shall recognize. The statute contemplates that the question whether a surety shall be required, and whether the surety is sufficient, shall be determined, and the recognizance shall be taken, at the time the defendant is placed on probation, and not afterwards. Since no other magistrate is authorized by the statute to take the recognizance in such cases (see R. L. c. 217, § 56), it seems that the recognizance can be taken only by "the court or a judge thereof in vacation." The phrase "a judge thereof in vacation" (a survival from the ancient terms of court, abolished by R. L. c. 160, § 39; compare Rules 16, 30, of the Municipal Court of the City of Boston, which mention "continued" actions) might seem to indicate that the recognizance may be taken at a time when the defendant could not be placed on probation; but the remainder of the act shows that such a practice would be impossible, and that phrase is doubtless an inadvertence, resulting from a failure to think out the practical working of this section.

The usual experience is that the defendant has no one who can fairly be expected to become surety for him under such a stringent recognizance, and that it is impracticable to require surety other than the probation officer. While a probation officer may, by authority of the law of the Commonwealth, arrest a defendant in his care within the Commonwealth for the purpose of surrendering him (R. L. c. 220, § 2) even though not surety for the defendant on any recognizance, it is the custom to have the probation officer recognize as surety in all kinds of cases (*Com. v. McGovern*, 183 Mass. 238), and that has the advantage of enabling him to arrest the defendant anywhere within the United States. *Com. v. Brickett*, 8 Pick. 137. *Taylor v. Taintor*, 16 Wall. 366. *Reese v. U. S.*, 9 Wall. 13. *State v. Lingerfelt*, 109 N. C. 775. *In re Von der Ahe*, 85 Fed. 959. That is especially useful in cases under the statutes discussed in this report, and the probation officer, in our opinion, should become surety in all such cases.

While no suit can be brought upon the recognizance without permission of the court, and therefore the probation officer can be protected against such technical recognizances, yet there seems to be no reason why the penal sum may not be made one dollar. There is no danger of a substitution of cash, because R. L. c. 217, §§ 77-79, apply only to recognizances merely for the appearance of the defendant.

If we are wrong in thinking that the recognizance under this act gives the probation officer the right as surety to arrest the

defendant in another state, and possibly also if some other person becomes a real surety for the defendant, it may be that an additional recognizance, in the usual form used in continued or probation cases, may be taken, with the probation officer as surety, in order to give the probation officer the usual rights of bail.

“Suit may be brought upon said recognizance by any person authorized by the court, and the proceeds of the suit shall be applied to the support of the wife or of the minor child or children as the court shall direct.”

This provision, and the provision in § 6 for the application of the sum recovered “in the discretion of the court,” are rather obscure. The case may pass from the lower court to the Superior Court at any time, according to the time when sentence is imposed, and without regard to the state of the recognizance. In such cases, it is hard to say which court is intended to act under this provision.

The lower courts have hitherto had no jurisdiction in suits on recognizances. Upon default “the recognizance shall be certified with a record of such default to the Superior Court” (R. L. c. 217, § 35), — a proceeding called an “estreat” or extract from the record of the lower court. The district attorneys are directed to bring suit within sixty days (R. L. c. 7, § 17), and the first Monday in each month is made a return day. R. L. c. 157, § 28. See also *Com. v. M’Neill*, 19 Pick. 127. *Com. v. Stebbins*, 4 Gray 25. While there is no inherent reason why an action of contract should not lie upon a recognizance, and while the statutes providing that the remedy shall be sought on the criminal side of the Superior Court do not in terms cover a recognizance under this act, it would nevertheless, in our opinion, be very unsafe to assume jurisdiction. The wiser practice would be to enter an authorization to the district attorney to bring suit, and to estreat the recognizance to the Superior Court.

Section 6, as amended by St. 1914, c. 520. If the court be satisfied by information and due proof under oath that at any time during said period of probation the defendant has violated the terms of the order, it may forthwith proceed with the trial of the defendant under the original charge, or sentence him or her under the original conviction, or enforce the suspended sentence, as the case may be. In case the defendant is admitted to bail pending the trial of the cause and the bail shall be forfeited, the money or sum recovered, and in case of the

forfeiture of the recognizance and enforcement thereof by execution the sum recovered may, in the discretion of the court, be paid in whole or in part to the probation officer, who shall pay over the same to the wife, or to the guardian or custodian of said minor child or children, or to the city, town, corporation or society supporting the wife or minor child at the time when the sentence was imposed, or to the treasurer of the commonwealth for the use of the state board of charity when the complaint is for neglect to provide for the support of a minor child or of minor children who have been committed to the custody of said board.

"Information and due proof under oath" probably is used in the popular sense, and the sworn testimony of the probation officer will suffice. But the expression is unnecessary and unfortunate.

There is no appeal from the enforcement of a suspended sentence. *Renado v. Lummus*, 205 Mass. 155.

Probably the provision for the use of forfeited bail for support, introduced by St. 1914 c. 520, does not apply to illegitimate children cases. A bill to apply it to such cases, and to cases of destitute parents, introduced by this Committee (1916 Senate Bill 46, §8), failed of passage.

Section 7. No other or greater evidence shall be required to prove the marriage of the husband and wife, or that the defendant is the father or mother of the child or children, than is or shall be required to prove the same facts in a civil action. In no prosecution under this act shall any existing statute or rule of law prohibiting the disclosure of confidential communications between husband and wife apply, and both husband and wife shall be competent witnesses to testify against each other to any and all relevant matters, including the fact of their marriage and the parentage of the child or children: provided, that neither shall be compelled to give evidence incriminating himself or herself. Proof of the desertion of the wife, child or children, and of the neglect or refusal to make reasonable provision for their support and maintenance, shall be prima facie evidence that such desertion, neglect or refusal is wilful and without just cause.

The following are common kinds of evidence tending to show a marriage: — (1) an attested copy of the town clerk's record of marriage. R. L. c. 151, §§ 37, 38. *Shutesbury v. Hadley*, 133 Mass. 242. (2) A parish record of marriage, where the person making it is dead, but probably not a certificate of marriage. *Kennedy v. Doyle*, 10 Allen, 161. *Com. v. Morris*, 1 Cush. 391. (3) The testimony of a party to the marriage ceremony. *Com. v.*

Dill, 156 Mass. 226. (4) The testimony of persons present at the ceremony. *Com. v. Hayden*, 163 Mass. 453. (5) Admissions made by the defendant. R. L. c. 151, § 39. *Com. v. Thompson*, 99 Mass. 444. (6) Testimony that the parties cohabited as husband and wife, and were reputed to be such. R. L. c. 151, § 39. *Newburyport v. Boothbay*, 9 Mass. 414. *Means v. Welles*, 12 Met. 356. *Knower v. Wesson*, 13 Met. 143. *Com. v. Hurley*, 14 Gray 411. *Randlett v. Rice*, 141 Mass. 385.

If a marriage ceremony in fact is shown to have taken place between parties competent to marry, it will be presumed to have been in accordance with the local law. *Raynham v. Canton*, 3 Pick. 293. *Com. v. Kenney*, 120 Mass. 387.

The provision sweeping away in these matters the troublesome rule, of questionable value, forbidding the introduction of private conversations between husband and wife, opens the door to useful evidence as to the reasons for disagreement and into the earning capacity of the defendant.

The statute does not say that a wife is a "compellable" witness upon the prosecution of her husband under these acts, but only a "competent" witness; — but the express provision against compelling incriminating testimony may suggest that other special privileges resulting from the relation are repealed for these proceedings — such as the privilege not to testify against her husband in a criminal case. R. L. c. 175, § 20, third.

The statute abolishes the sentimental rule that a mother or her husband cannot testify so as to bastardize "the issue of the mother born in lawful wedlock." *Com. v. Rosenblatt*, 219 Mass. 197. See *Wigmore Evid.* §§ 2063, 2064.

An entirely different rule, which the statute does not modify at all, relates to the facts necessary to establish the illegitimacy of a child born to a married woman. "It is established law, that every child born in wedlock, when the husband is not shown to be impotent, is presumed to be legitimate, even though the parties are living apart by mutual consent; that this presumption (as held in modern times) may be rebutted by proof that the husband had no access to his wife during the time when, according to the course of nature, he could be the father of the child; but that the presumption cannot be rebutted by proof of the wife's adultery while cohabiting with her husband — the law not allowing the admission of evidence on the question, whether the adulterer or the husband is most likely to be the father of the child." *Hemmenway v. Towner*, 1 Allen 209. *Accord, Phillips v. Allen*, 2 Allen 453 (child born

eight months after marriage). *Sullivan v. Kelly*, 3 Allen 148. *Joyce v. Dyer*, 189 Mass. 64. *Koffman v. Koffman*, 193 Mass. 593. Where the parties are living apart, though not so far as to make intercourse impossible, evidence of non-access in fact is usually admitted. Wigmore Evid. §§ 134, 137, 2527. *Com. v. Rosenblatt*, 219 Mass. 197. As to the legitimacy of children conceived before marriage, but born in wedlock, see the discussion of the Illegitimate Children Act, in this report. A sentence under the Uniform Desertion Act, for non-support of a child, establishes his legitimacy between the Commonwealth and the defendant. *Com. v. Ellis*, 160 Mass. 165.

The provision that want of cause for a dereliction in duty on the part of the defendant shall be presumed, is very useful. The facts as to the defendant's health and earning capacity are so much in his own possession, that the prosecution, without this provision, would often be at a loss to prove a good case against a technical objection. Yet a court should feel satisfied that it knows the real facts of the matter before making an order or imposing sentence, and for this reason the investigation by the probation officer, before disposition of the case, is most valuable.

Section 8, as amended by St. 1912, c. 264, c. 310. It shall be the duty of the superintendent, master or keeper, as the case may be, of any reformatory or penal institution in which any person is confined by virtue of a sentence imposed under the provisions of this act, providing that the court imposing such sentence finds the wife, child or children, as the case may be, of such person to be in destitute or needy circumstances, to pay over, [from the annual appropriation for the maintenance of such reformatory or penal institution], to the probation officer, at the end of each week a sum equal to fifty cents for each day's hard labor performed by the person so confined. In making the payment the superintendent, master or keeper, as the case may be, in charge of the reformatory or penal institution, shall state the name of the person for whose labor the payment is made, and the probation officer shall pay over such sum promptly to the wife, or to the guardian or custodian of the minor child or children of the person so confined, or to the city, town, corporation or society supporting the wife or minor child or children at the time when the sentence was imposed, or to the treasurer of the commonwealth for the use of the state board of charity when the complaint was for neglect to provide for the support of the minor child or of minor children who have been committed to the custody of said board.

There should be no illusion about the payment of fifty cents per day, provided by this section. In few penal institutions, if any, is there any profit resulting from the labor of prisoners. This provision is merely one for compulsory charity by the state or county, to the relief of local authorities. The finding of needy circumstances should not be made mechanically, but should be reserved for cases of actual pressing need. A good amendment to the statute would be one allowing commitment to the state farm, where a shiftless husband could come nearer to earning the money paid his wife.

Section 9. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Section 10. All acts and parts of acts inconsistent herewith are hereby repealed.

This doubtless repeals all the older criminal remedies for non-support.

Section 11. This act may be cited as the Uniform Desertion Act.

The following is a summary of the procedure recommended for the ordinary case under the statutes discussed in this report:

I. Unless the defendant has been before the court at an earlier date, or it appears probable that he will flee from the jurisdiction, an investigation by the probation officer or by a discreet police inspector, who will interview both parties, should precede the issuance of a complaint. In that way many cases will be adjusted, without the humiliation and bitterness occasioned by legal proceedings. Often the aid of the church and charitable societies can be invoked at this stage, with good results.

II. If it be decided that a formal complaint shall be received and prosecuted, a summons rather than a warrant should ordinarily be issued. In illegitimate child cases a warrant is usually more necessary, but even then it should not be issued where there is no substantial danger of flight.

III. If it can be arranged, cases under these acts should be heard by themselves, with as little publicity as is legally possible, and not in the presence of a throng drawn together to witness some more sensational trial. A special day for such cases is suggested, as a promising plan. Some of the features of the domestic

relations session of the Municipal Court of the City of Boston may perhaps be adopted even in smaller courts.

IV. After the hearing, unless the defendant be discharged, the case may well be continued a few days to enable the probation officer to investigate the earnings of the defendant and the condition of the family, and to endeavor, with such aid as he can get, to reconcile the parties.

V. The disposition of the case, after a plea or finding of guilty, should include an order for weekly payments to the probation officer; a placing on probation until a day certain, not less than six months nor more than two years away; a recognizance, usually with the probation officer as surety; and, unless the court has considerable confidence in the defendant, a sentence, usually of two or three months in the house of correction, and a suspension of the execution of the sentence, conditioned upon performance of the order, and compliance with the usual probation conditions. Where the court has confidence in the defendant, simple probation may be used, instead of a suspended sentence. It is of doubtful wisdom to require the defendant to assign his wages to the probation officer, or to give him an order on the employer, as this incites rebellion and is a source of constant irritation.

VI. The probation officer should use a systematic method of collections, and should follow up the payments as maturities are followed up in a bank. Promptness is the great preventive of delinquency. If any need of increased pressure appears, the probation officer should surrender the defendant and a suspended sentence should be imposed, upon the same conditions, if none has been imposed before. St. 1916, c. 208, and St. 1912, c. 675, § 6, bid fair to end the evil of assignments of wages interfering with the payments to the probation officer.

VII. If wilful default continues, the court must revoke the suspension of the sentence if the probation system is to mean anything.

ILLEGITIMATE CHILDREN ACT (St. 1913, c. 563).

The old bastardy law (R. L. c. 82, and amendments) was of the common New England type, providing for a civil action brought by the mother or the overseers of the poor. Where the defendant had property, it was fairly efficient. But in the common case where the defendant had no property, it was wholly inefficient in securing the object shown by its title, the "maintenance of bastard children."

Upon an adjudication of paternity under the old law, the court committed the defendant to jail until he should give a bond with sureties for the payment of specified amounts periodically for the support of the child. The complainant had a right to this order of commitment, no matter how impossible it was for the defendant to give bond or support the child. The defendant could not free himself from imprisonment except by taking the poor debtor's oath at the end of four months.

On the other hand, the defendant, once released, was immune from further effective action unless he happened to have property which could be taken on execution.

The result of these provisions, in the case of the ordinary defendant without leviable property, was that a compromise was effected, either by a forced and unhappy marriage or by a cash settlement for a comparatively small sum — from twenty-five dollars to five hundred dollars — from which the child usually received no real benefit. The defendant feared that, despite his poverty, he would go to jail automatically for failure to give bond. The complainant feared that the defendant would go to jail rather than pay any considerable sum. The resulting settlement was a travesty on the title, "The Maintenance of Bastard Children."

The idea of assimilating the procedure in illegitimate children cases to that under the Uniform Desertion Act, and of using the probation collection system generally adopted under that act, did not originate in Massachusetts. Wisconsin in 1911 included illegitimate children within the Uniform Desertion Act as passed, and before that the conference of Commissioners on Uniform State Laws had debated the matter.

The Massachusetts act (St. 1913, c. 563) was drafted by this committee, and slightly amended in the committees of the Massa-

chusetts Bar Association and in the Legislature. It was introduced upon the petition of a member of this committee, and was passed by the efforts of the several committees just mentioned (compare Mr. James P. Ramsay, "One More Chance," page 168), with the aid of various societies interested in children. To secure the use of the probation system, the proceedings were made criminal, and to obtain the right to arrest the defendant before the birth of the child, the begetting of an illegitimate child, as well as its non-support, was made a misdemeanor. It was not expected, however, that any court would impose a sentence under the act, except for the purpose of enforcing compliance with an order for support.

The fact that proceedings under the present law are criminal necessitates proof beyond a reasonable doubt. Compare St. 1911, c. 456, § 7. This is as it should be. The severe and lasting obligations of the present law, to say nothing of the disgrace, should not be imposed upon a defendant by guesswork. The perfunctory practice permissible under the old law should be forever discarded. Of course the testimony of the complainant alone may be convincing (*Com. v. Callaghan*, 223 Mass. 150), and, even if it is not, the court should take care that a woman is given an opportunity to secure by continuance corroborative evidence of intimacy, or other facts, the importance of which has not been impressed upon her by her friends or advisers. But when the complainant has presented her case fully, the defendant should be discharged unless the evidence of paternity is satisfactory and convincing.

AN ACT RELATIVE TO ILLEGITIMATE CHILDREN AND THEIR MAINTENANCE.

Be it enacted, etc., as follows:

Section 1. Whoever, not being the husband of a woman, gets her with child shall be guilty of a misdemeanor. Proceedings under any section of this act may be begun in the municipal, district or police court having jurisdiction in the place where the defendant lives, and if there be no such court, then in any municipal, district or police court in the county; or in the municipal, district or police court having jurisdiction in the place where the mother of the illegitimate child lives; and if there be no such court, then in any municipal, district or police court in the county. If no court has jurisdiction as aforesaid, proceedings may be begun before a trial justice in the county where such defendant or such mother lives.

For reasons explained in the treatment of the Uniform Desertion Act, the jurisdiction of trial justices is excluded unless both parties live in Nantucket. In all cases the proceedings may be brought in a lower court in the county where the defendant lives, or in the county where the mother lives. Having found a proper county, the proceedings must be brought in the court within whose judicial district the party lives whose residence within the county gives jurisdiction, if that party lives within a judicial district; otherwise in any court in the county. Indictment is probably impossible, for reasons already explained under the Uniform Desertion Act.

Good criminal pleading demands that the begetting be alleged to have taken place "on" — not "on or about" — a certain day, and that allegation will be supported by proof of begetting on any day. *Com. v. Sego*, 125 Mass. 210.

Section 2. If the defendant pleads guilty or nolo contendere, or is found guilty, the court or justice shall enter a judgment adjudging him the father of such child; but such adjudication shall not be made after a plea of not guilty, against the objection of the defendant, until the child is born or the court or justice finds that the mother is at least six months advanced in pregnancy. No provision of law limiting adjournments or continuances shall apply to proceedings under any section of this act. At the sitting when such adjudication is made, if made after a plea of not guilty, the defendant may appeal therefrom to the superior court as in other criminal cases. Such adjudication, whether any sentence be imposed or not, shall be final and conclusive unless an appeal from such adjudication to the superior court be taken as hereinbefore provided, or, if such adjudication be made by the superior court, unless set aside upon an appeal taken not later than three days thereafter under the provisions of section thirty-two of chapter two hundred and nineteen of the Revised Laws, or upon exceptions. Such adjudication may be entered by the superior court notwithstanding exceptions have been alleged or an appeal has been taken. The court or justice making such adjudication may within one year thereafter grant a new trial for any cause.

The adjudication of paternity serves several purposes, and is one of the most valuable features of the statute. If it were not for that provision, the only technical "judgment," from which an appeal might be taken in the lower court, and which, if not vacated by appeal, would constitute a final adjudication of the question of paternity, would be the sentence. See *Com. v. Ellis*, 160 Mass. 165. *Marks v. Wentworth*, 199 Mass. 44. Unless, therefore, a

sentence should be imposed, the defendant might remain on probation for a long time and yet, if he should subsequently decide to refuse to pay, receive a sentence and appeal, he might compel the re-trial of the whole matter in the Superior Court at a time when the evidence had disappeared. More than that, since filing or dismissal is the normal ending of probation cases, whether a suspended sentence be imposed or not, a defendant might comply with the order for support, and yet re-try the whole question some years later upon a new complaint against him for non-support under § 7.

In order to give a right of appeal from the adjudication, the plea obviously must be not guilty, as the statute provides, and the appeal must be taken at the same sitting at which the adjudication was made. There is no constitutional need of an appeal from the character or amount of the sentence or other disposition, and no real reason why a defendant should not in all criminal cases be required to appeal from the finding of guilty, if he is to appeal at all (see Lummus, "The Failure of the Appeal System," 1909, pages 28, 29; Report of the Municipal Court of the City of Boston, 1916, page 11), instead of holding the right of appeal in reserve while he traffics as to the sentence or other disposition; the provision in this section for appeal from the adjudication "at the sitting when such adjudication is made" prevents this abuse of the right of appeal, especially if the court wisely continues the case, after adjudication of paternity, to a later date before considering the question of disposition. If an appeal is taken, the lower court does not have to go through the farce common in other criminal cases, of considering carefully the question of disposition and then seeing the case appealed, ostensibly to secure the constitutional right of trial by jury on the merits, but really to secure a more favorable disposition of a case upon which there is no dispute on the merits;—the defendant in an illegitimate child case rightly must decide whether he prefers disposition by the lower court or the Superior Court, before he can require the lower court to consider the question of payments. If he does appeal from the adjudication, no further action can be taken in the lower court.

An adjudication in the lower court, not appealed, is conclusive in all future proceedings involving the issue of paternity, while an adjudication made in the Superior Court is conclusive unless and until reversed on exceptions or appeal. § 7. The time for appeal from the Superior Court to the Supreme Judicial Court, which is left uncertain in other criminal cases, is limited to three days by this act, by analogy to the time for exceptions.

The statute does not mention the general right of appeal from the sentence of the lower court, existing in criminal cases in general (St. 1913, c. 652), and it is an open question whether it applies to illegitimate child cases under § 1. If it does, it is clear that it does not re-open an adjudication of paternity not appealed from, but merely permits the Superior Court to revise the disposition of the case. In *Richard v. Gallagher* (Rugg, C. J., Oct. 1, 1914), reported in our Report No. 3, there are intimations that § 2 states the entire right of appeal, and that there is no right of appeal from the sentence under the general law. But the defendant had made an attempt to appeal from an order of support, which plainly could not be allowed, so that the point was not raised clearly. An appeal from the sentence, under the general law, could not be denied in a case brought under § 7, for that section provides for no interlocutory judgment or adjudication of paternity, and an appeal from the sentence must be allowed in order to preserve the right to a jury trial.

The provision enabling the defendant to postpone any adjudication until the court finds that the mother is at least six months advanced in pregnancy, is for the benefit of the defendant, in order that no mistake may be made concerning the pregnancy. The court may make an adjudication of paternity at an earlier time, if the defendant pleads guilty or *nolo contendere*, or makes no objection; but it may not be done in any contested case against the objection of the defendant. The power to make the adjudication before the birth permits a speedy disposition of admitted or clear cases, permits timely orders for the payment of confinement expenses, and accelerates the disposition of appeals; but in well contested or doubtful cases there is nothing to prevent the court from continuing the case for further hearing until the child is born, in order to learn the appearance of the child (*Scott v. Donovan*, 153 Mass. 378) and the date of the birth as compared with the alleged date of intercourse. St. 1914, c. 465, restricting the length of continuances in lower courts, has no application to cases under this act.

The statute does not say that a hearing may not take place within the six months, but only that the adjudication in certain cases must be postponed. It is the moral right of a defendant to have a hearing as soon as the complaint is made, if he desires it, because he may be able to convince the court that he is entitled presently to be discharged. But ordinarily the hearing should not be closed until it is possible to make an adjudication of paternity.

Pending the hearing and disposition bail should be required, in an amount ranging from two hundred to five hundred dollars.

The provision for new trials is in accord with R. L. c. 219, § 33, but extends to the lower courts as well as to the Superior Court.

Section 3. If the court or justice having jurisdiction of any case under any section of this act becomes satisfied that no living child will be born of which the defendant at the time of making the complaint was the father, or that the defendant and the mother have married each other and the child has become or will be the legitimate child of the defendant, or that adequate provision has been made for the maintenance of the child, the complaint may be dismissed and any adjudication vacated; and if the court or justice certifies that such provision has been made, no further complaint shall be maintained under any section of this act.

Under the old bastardy law, as has been pointed out, one of the principal evils was the ease with which an improvident complainant could be persuaded to accept a small cash settlement, in complete disregard of the interests of the child. In the first draft of the present Illegitimate Children Act, it was proposed to use orders for periodical payments in every case, and no provision for a money settlement was made. The only provision for vacating any adjudication or dismissing the action, was in case the court found (1) that no child will be born or (2) that the child has become or will be the legitimate child of the defendant.

Our statute as to legitimating children (R. L. c. 133, § 5) provides, "An illegitimate child whose parents have intermarried, and whose father has acknowledged him as his child, shall be considered legitimate." *Houghton v. Dickinson*, 196 Mass. 389, shows that such acknowledgment may be inferred from conduct. Where the marriage takes place after the conception but before the birth, the child is presumed to be the legitimate child of the husband, because of the "supposed acknowledgment of paternity by the subsequent act of marriage." *Reynolds v. Reynolds*, 3 Allen 605, 610. *Phillips v. Allen*, 2 Allen 453. *Foss v. Foss*, 12 Allen 26. *Crehore v. Crehore*, 97 Mass. 330. *Dennison v. Page*, 29 Pa. St. 420; s. c., 1 Grant's Cases, 377. *Kleinert v. Ehlers*, 38 Pa. St. 439. *Wright v. Hicks*, 15 Ga. 160. *Jackson v. Thornton*, 133 Tenn. 36. 36 L. R. A. (N. S.) 255, note. 7 C. J. 940. The act rightly provides for dismissing the complaint where the child has been legitimated, or will be legitimate when born, for its support can then be enforced under the Uniform Desertion Act.

When the Illegitimate Children Act was before the Legislature, a prominent Boston attorney objected to the requirement of court proceedings, with orders for payment, in every case. He urged that some provision should be made to enable a defendant, if financially able, to settle a considerable sum upon the child and thus end a case that was intended to do nothing more than to obtain support for the child. This seemed reasonable, and a clause was inserted allowing the final dismissal of the complaint and discharge of all liability if the court certifies that "adequate provision has been made for the maintenance of the child."

For a time, at least, the framers of the act had reason to regret that any such clause had been inserted. Some judges and district attorneys, and a considerable section of the bar, refused to believe that any radical change in the practices that had grown up under the old bastardy law could have been intended by the Legislature. Since cheap cash settlements had been the rule in the old days, they argued, they must still be allowed. The proceedings under the old law resulted in giving the mother, as civil damages, a lump sum of money; was she not entitled to it under the new law? Why take any interest in the welfare of the child? — The old law did not direct it. If we do not accept what the defendant chooses to pay, it was urged, he will run away, and the mother will get nothing. In a close case, at any rate, they said, a small settlement is a fair compromise. Such were the arguments of conservatives who were wedded to the old notions, and objected to being called upon to think the matter out anew.

The ideas just mentioned result from a failure to read the plain English of the act, and from an entire misapprehension of its purpose. The new law was intended to make a radical change in the point of view as well as in the practice. It was intended to end forever the disgrace of cheap, forced settlements of bastardy cases. The new law was not intended for the benefit of the mother, except perhaps as to the confinement expenses, but for the benefit of the child. The frequent desire of the mother for a little money to spend, is one that the courts, if they are to do their duty, must oppose. The judge is often the only person in the case who has any disinterested regard for the welfare of the child, and he should bend his judicial action to that end, regardless of the agreements or desires of the parties. The fear of the flight of the defendant is not much greater than it is in non-support cases, and yet we hear no proposition that husbands be allowed to purchase permanent immunity for a few hundred dollars. The chances are that a

Massachusetts man will not wish to exile himself, and that a live probation officer as surety will be able to find him. As to compromise settlements, there is no rightful place for them in this law. If the defendant is the father, he should do his full duty; if he cannot be shown to be the father, it is very bad policy, based upon the obsolete notion that the mother has a right to damages, to allow a woman to collect blackmail in this way.

The statute is plain enough — the court must certify that “adequate provision has been made for the maintenance of the child.” On February 14, 1914, this Association voted “That it is the sense of this meeting that the provision for the dismissal [upon certificate] of complaints against fathers of illegitimate children contained in St. 1913, c. 563, § 3, should not be employed in place of a continuing order, except in cases where the settlement agreed upon makes adequate provision during the full period of the probable dependence of the child.” Sometimes, where the child has been legally adopted by thoroughly responsible people, a court may make a certificate of adequate provision after a trifling cash settlement or no cash settlement at all. But where there is nothing but a cash settlement of one or two or three or even five hundred dollars, is not a court stultifying itself when it certifies that that is “adequate provision” for the present and future maintenance of the child? If the child later suffers want, or is left a charge upon the public or upon the meager earnings of the mother, the court can hardly shift the responsibility. It is time that it be generally understood, that this provision for final dismissal upon certificate was intended for the very rare and exceptional case of a defendant able and willing to make a settlement of several thousand dollars upon the child; and it was expected that orders for periodical payments would be used in ninety-nine per cent of all cases.

If for any reason a cash settlement is permitted, it is unwise, as a rule, to permit it to be paid to the mother. After a reasonable sum has been deducted for counsel fees and confinement expenses, the rest should be deposited with the probation officer or other trustee, to be paid periodically to the person supporting the child.

It is possible that a case may be filed or dismissed, without any certificate, in such a way that the particular prosecution may be compromised and ended, and yet the liability to support may still exist. The statute does not provide for this, but it may be possible as a matter of general criminal law. See *Com. v. Bressant*, 126 Mass. 246. *Com. v. Hart*, 145 Mass. 7. This, if permissible, would obviate some of the objections just mentioned. It is clear that

settlements between the parties, out of court, are of no legal effect, except that any money paid the mother may be considered by the court in making an order for payments.

Section 4. If the child has not been born at the time of such adjudication, the court or justice having jurisdiction of the case shall continue the case from time to time until the child is born. At any time after such adjudication, after inquiring into the respective means of the defendant and the mother, the court or justice having jurisdiction of the case may make an order for the payment to the mother or to a probation officer of a sum of money to be determined by the court or justice for the expenses of the confinement of the mother, and for failure to comply with such order may order that the defendant be committed to jail, as for a contempt of court, for a term not exceeding two months, unless he shall sooner comply with the order of the court.

If the defendant is in humble circumstances, an order for the payment of twenty-five dollars as confinement expenses is common. The order should always provide for payment to the probation officer rather than the mother, in order to avoid disputes. Proceedings for contempt should be supported by the sworn affidavit of the probation officer, as to the non-payment of the sum ordered.

Section 5. After such adjudication, the court or justice having jurisdiction of the case may make such order as may be considered expedient relative to the care and custody of the child, and afterward from time to time may revise and alter the said order, as justice and the welfare of the child require, and the order shall be binding on all persons.

This section was intended to apply to the occasional instance where the mother takes no interest in the child or where her habits are such as to make her an improper custodian. Care should be taken, however, not to award custody to a defendant unless he is wholly trustworthy, for the average defendant has no interest in the life or comfort of his illegitimate child — such a child, to its father as well as to the thoughtless portion of the public, is still the object of unreasoning prejudice. Care should be taken to serve a notice upon the mother, if she is not the complainant. The enforcement of such an order must be sought by a petition for a writ of habeas corpus or other independent proceeding, just as in the case of custody awarded by the probate court.

Section 6. After such adjudication, and after the child has been born, the defendant shall be liable to contribute reasonably to the sup-

port of the child during minority, and shall be subject upon the original complaint under section one of this act, to all the penalties and all the orders for the support and maintenance of the child provided in the case of a parent who is found guilty of unreasonably neglecting to provide for the support and maintenance of a minor child by chapter four hundred and fifty-six of the acts of the year nineteen hundred and eleven and acts in amendment thereof and in addition thereto; and the practice thereby established shall, so far as it is applicable, apply to proceedings under this section and the preceding sections of this act.

Except as to orders for the payment of confinement expenses, the proceedings must stop with the adjudication of paternity, until the child has been born. In the meantime continuances must be entered. After the birth, and not before, the case is ripe for an order for periodical payments and a sentence, which usually is a suspended sentence of from two to six months.

The obligation of the defendant to "contribute reasonably" is intended to conform to the obligation under the old bastardy act, to "stand charged with the maintenance thereof, with the assistance of the mother." There is no reason why the mother should not contribute, if able; but as a rule the mother has small earning capacity, especially since the child occupies much of her time, and her ability to contribute in money is usually negligible.

The "practice" under the Uniform Desertion Act, which is adopted, includes the presumption that non-support is without just cause (*Com. v. Callaghan*, 223 Mass. 150), though that question is hardly material in cases under § 1; and also the special rule of evidence permitting a married woman to testify to the illegitimacy of her child. *Com. v. Rosenblatt*, 219 Mass. 197. There seems to be no authority for admitting in evidence the mother's accusations, made in the time of her travail, which formerly were admissible under R. L. c. 82, § 16. The same section provided that the mother might be compelled to testify, although to self-incriminating facts; but no such provision appears in the new law.

Section 7. Any father of an illegitimate child, whether such child shall have been begotten within or without this commonwealth, and whether such child shall have been begotten before or after the taking effect of this act, who neglects or refuses to contribute reasonably to the support and maintenance of such child shall be guilty of a misdemeanor, and, upon conviction thereof, shall be liable to all the penalties and all the orders for the support of the child provided in the case of a parent who is found guilty of unreasonably neglecting to provide

for the support and maintenance of a minor child by chapter four hundred and fifty-six of the acts of the year nineteen hundred and eleven and acts in amendment thereof and in addition thereto; and the practice thereby established shall, so far as it is applicable, apply to proceedings under this section. If there has been any final adjudication under this act, such judgment, order or adjudication shall be conclusive on all persons in proceedings under this section; otherwise, the question of paternity shall be determined in proceedings under this section: provided, however, that no proceedings shall be maintained under the provisions of this act in any case where proceedings have been begun under chapter eighty-two of the Revised Laws and acts in amendment thereof or in addition thereto.

As has already been stated, the desire to give the right to arrest before the birth of the child, required that the begetting of an illegitimate child be made the offence under § 1. But that offence could not be made punishable where it occurred before the passage of the new law or outside the Commonwealth. For that reason the present section had to be inserted, to cover such cases. This section does not attempt to punish acts done before July 1, 1913, or acts done outside the Commonwealth. It merely provides that a man who is in fact the father of an illegitimate child, wherever or whenever conceived, shall support it, under penalty. The section is perfectly constitutional. *Com. v. Callaghan*, 223 Mass. 150.

Some persons have thought that all complaints made after the child is born should be brought under § 7, but that is erroneous. Proceedings under § 1 may be brought after the child is born, as well as before, provided the child was begotten in Massachusetts since July 1, 1913. Section 7 should never be used where § 1 is applicable, because the procedure under § 1, with its interlocutory adjudication of paternity, is distinctly superior. There is no way, under § 7, of conclusively establishing the paternity of the child for all future proceedings, except by imposing some sentence; and it is good practice, instead of filing such cases at the end of probation, to impose a nominal fine for the purpose of making the paternity *res judicata*. *Com. v. Ellis*, 160 Mass. 165. Another way is to impose at once a nominal fine on the first complaint brought under § 7, to conclude the question of paternity, and then to make a new complaint, covering a different period of non-support (*Com. v. Dunster*, 145 Mass. 101), upon which an order for periodical payments may be based. An appeal must necessarily be allowed from the sentence, in proceedings under § 7.

Another occasion for using § 7, is in a case where proceedings

have already been had under § 1, so that the power to use § 1 has been exhausted. After the legal limits of probation with an order for support under § 1 have been reached, and the original case has necessarily been disposed of, the defendant still remains subject to the duty "to contribute reasonably to the support of the child during minority" (§ 6); and compliance with that duty can be enforced only under § 7.

An appeal from the sentence cannot, of course, reopen an adjudication of paternity already finally established upon an earlier complaint under § 1, as the statute clearly states. The words "judgment, order or" in this section were retained by inadvertence, after an amendment of the bill which destroyed their significance.

The adoption of the practice under the Uniform Desertion Act has already been discussed under § 6.

Section 8. Appealed proceedings under this act shall be placed on the trial list for each sitting of the superior court for the trial of criminal cases until tried, and shall have precedence next after the cases mentioned in section thirty-two of chapter one hundred and fifty-seven of the Revised Laws.

Section 9. Chapter eighty-two of the Revised Laws and all acts in amendment thereof or in addition thereto are hereby repealed; but this repeal shall not affect any proceeding begun before the first day of July, in the year nineteen hundred and thirteen.

The immediate repeal of the old bastardy law, which was effected by an amendment made against the advice of this Committee, produced for some months after July 1, 1913, a situation in which pregnant women could proceed neither under the old law, because it was repealed, nor under the new law, because the child was begotten before it took effect. They had to wait until the child was born, and then make complaint under § 7.

Section 10. This act shall take effect on the first day of July in the year nineteen hundred and thirteen.

DESTITUTE PARENTS ACT (ST. 1915, c. 163).

AN ACT RELATIVE TO THE SUPPORT OF DESTITUTE PARENTS.

Be it enacted, etc., as follows:

Section 1. Any person, above the age of twenty-one years, who, being possessed of sufficient means, unreasonably neglects or refuses to provide for the support and maintenance of his parent, whether father or mother, residing in this commonwealth, when such parent through misfortune and without fault of his own is destitute of means of sustenance and unable by reason of old age, infirmity or illness to support and maintain himself or herself, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment. No such neglect or refusal shall be deemed unreasonable as to a child who shall not during his or her minority have been reasonably supported by such parent, if the parent was charged with the duty so to do, nor as to any child who, being one of two or more children, has made proper and reasonable contribution toward the support of such destitute parent.

In view of the short time that this law has existed, we can suggest only a few of the more obvious points. Much must be left to future experience.

Previous to this act, the only remedy against children who refuse to support their destitute parents was by a suit in equity under R. L. c. 81, §§ 10-16, providing for the liability of kindred in the direct line of descent, as far as grandparent and grandchild, for the support of poor persons. The kindred are liable if they are shown to be "of sufficient ability," and apparently the orders may be enforced by process for contempt. See *Hutchings v. Thompson*, 10 Cush. 238. *Farr v. Flood*, 11 Cush. 24.

In *Templeton v. Stratton*, 128 Mass. 137, an elderly man in poor health, whose income for some years had not met his family expenses, was held of sufficient ability, where he had assets of about \$5,000. It was said that if the required contribution "would not cause present deprivation of reasonable and comfortable support of the respondent and his family, or interfere with the fulfilment of his obligations to others," the fact that such contribution might impair his capital was not of itself a sufficient reason why

such contribution should not be made. See also *Chapin v. McCurdy*, 196 Mass. 63. *Fairhaven v. Howland*, 216 Mass. 149. *Newton v. Feeley*, 130 Mass. 12. In *State v. Witham*, 70 Wis. 473, a husband was held to be "of sufficient ability" to support his wife, although he had no means except his personal earnings.

It should be noticed that under this act (contrary to the Uniform Desertion Act (*Com. v. Acker*, 197 Mass. 91) and doubtless the Illegitimate Children Act also), the dependent must reside within the Commonwealth.

The act requires, before imposing any criminal liability upon the child, that the parent must have performed his duty to the child; the parent must have been a parent in fact and in act, as well as in name. In this respect the criminal remedy is less broad than the civil.

"Being possessed of sufficient means."

It may seriously be questioned whether this statute imposes any greater obligation than that imposed by R. L. c. 81, §§ 10-16. *Templeton v. Stratton*, 128 Mass. 137. A husband and father has been held to have sufficient "means" to support his family, if he has adequate earning capacity, though no property. *State v. Bartley*, 96 Atl. 305 (R. I.).

Married sons are undoubtedly obliged to contribute, where the required contribution "would not cause present deprivation of reasonable and comfortable support of the respondent and his family" or "interfere with the fulfilment of his obligations to others," even though a curtailment of luxuries for themselves and their families must result. Can married daughters be permitted to live in luxury, without making a similar contribution, and rely upon their lack of individual property as a defence? The framers of the act probably did not intend that they should do so, but it is hard to find a legally justifiable way to enforce payments from them. The making of an order by a court should mean that the court stands ready to punish in case of failure to comply. Where a woman has no property or income of her own, and is wholly dependent upon her husband for everything beyond the living that he is bound by law to furnish her, a court could hardly punish her for her husband's failure to furnish money for the support of her parents. It would be impracticable to compel her to earn the money outside the home, for that would mean the neglect of her own household duties, and in the case of many women the earning ability would be trifling.

“ When such parent through misfortune and without fault of his own is destitute of means of sustenance and unable by reason of old age, infirmity or illness to support and maintain himself or herself.”

If we were to go back through our lives, it probably would be discovered that most of our troubles were the result of fault of our own. Industry, energy, prudence and economy, persisted in for a lifetime, would make almost every man independent. But the statute doubtless intends to hold complainants to no such standard as that. It has reference, it seems, only to such faults as directly, within a recent time, have led to destitution. If a parent has given away his money to some favorite child, or has wasted it in drunkenness, gaming or other vice, and then insists that he be supported by his children, a defence seems to be made out. But the fact that the parent through his life has been somewhat lacking in energy, or has been improvident, or even has been addicted to liquor, does not seem to deprive him of the protection of the statute. It is to be noticed that R. L. c. 81, §§ 10-16, found no defence upon the character of the dependent.

Section 2. Before the trial, with the consent of the defendant, or at the trial, on entry of a plea of guilty or after conviction, the court may, in its discretion, make such orders and require such conditions for the benefit of such destitute parent as are provided for in the case of a wife or a minor child by chapter four hundred and fifty-six of the acts of the year nineteen hundred and eleven and acts in amendment thereof and in addition thereto, and the practice thereby established shall, so far as it is applicable, apply to proceedings under this act.

These provisions are similar to those contained in the Illegitimate Children Act, §§ 6, 7; and the discussion of those sections may be referred to.

Section 3. Complaints under the provisions of this act may be made by any such parent, by any child of such a parent, by the overseers of the poor of the city or town in which the parent has a settlement or by any other public relief officer. Proceedings under this act may be begun in the municipal, district or police court having jurisdiction of the place where the defendant lives, and if there be no such court, then in any municipal, district or police court in the county; or in the municipal, district or police court having jurisdiction of the place where the parent lives; and if there be no such court, then in any

municipal, district or police court in the county. If no court has jurisdiction as aforesaid, proceedings may be begun before a trial justice in the county where the defendant or the parent lives.

Note that the complaint must be made by the persons named (*Com. v. Rawson*, 183 Mass. 491); a complaint made by an unauthorized person cannot stand. Possibly since St. 1916, c. 174, the person named as complainant will be presumed to be an authorized person; but a plea in abatement would open the question. When the complaint is made by the overseers of the poor, probably the whole board must sign the complaint. While a city almoner may complain as a "public relief officer" it is doubtful whether an individual member of the board of overseers of the poor can claim to be such.

The venue follows that under the Illegitimate Children Act.

Respectfully submitted,

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